

A NEW BREXIT DEAL – WHAT HAS CHANGED AND WHAT HAPPENS NEXT?

The EU and the UK have agreed a new Withdrawal Agreement and Political Declaration with limited – but important – changes to the previous deal. The UK Prime Minister has succeeded on a first Parliamentary vote in favour of the legislation to implement the new deal but has failed to secure an accelerated timetable for the passing of that legislation. The EU now has to consider the UK's request for an extension of the Article 50 period.

WHAT HAS CHANGED IN THE WITHDRAWAL AGREEMENT?

Much of the Withdrawal Agreement remains unchanged. The most politically-charged amendment is the removal of the "backstop" provision negotiated by former UK Prime Minister Theresa May in her previous deal, the purpose of which was to avoid a hard border on the island of Ireland. Had Theresa May's negotiated deal come to fruition, the backstop provision would have seen the whole of the UK indefinitely remain in the customs union and maintain regulatory alignment for goods crossing from the UK to the EU if the parties did not agree a future UK-EU relationship by the end of the transition period. For Brexiteers this represented the entrapment of the UK in the EU and adversely affected the UK's ability to enter into trade deals.

In Boris Johnson's renegotiated deal, Northern Ireland leaves the EU customs union after the end of the transition period along with the rest of the UK, but avoids a hard border across the island of Ireland by moving customs and regulatory checks to the Irish sea. Goods passing through "points of entry" to Northern Ireland from Great Britain may be subject to payment of EU duties if the goods are deemed to be "at risk" of moving on into the EU. Goods coming into Northern Ireland from outside the EU are subject to UK duties unless they are deemed "at risk" of moving on into the EU - when they would be subject to EU duties.

Significantly, from the Brexiteers' perspective, the UK will be free to sign new free trade agreements and these agreements will apply to Northern Ireland. Northern Ireland would follow EU single market rules on the regulation of goods to avoid regulatory checks at the Irish border.

A new element is that these arrangements would be subject to a vote of the Northern Ireland Assembly four years after the transition period ends, and if they continue to have the Assembly's support they will remain in place for another four years or until an agreement on the future relationship between the EU and UK is found. Critically, that vote is by way of a majority in the Northern Irish assembly, with neither nationalists nor republicans having a veto. This is the

cause of the concerns of the Northern Irish Democratic Unionist Party (DUP) and ultimately appears to have cost their backing.

Another important change, which is discussed further below, is that all "level playing field" provisions that were contained in previous draft of the Withdrawal Agreement (a legally binding document) have been removed from the Withdrawal Agreement. The parties stated in the previous draft that they will commit to uphold "common high standards" in areas of "state aid, competition, social and employment standards, environment, climate change and relevant tax matters". The removal of these level playing field provisions from the Withdrawal Agreement may have an impact on the extent to which the UK and EU share "common high standards" in the future, though level playing field provisions are now addressed in the (non-legally binding) Political Declaration (see below).

Further, while this removal would mean that the UK is no longer bound to level playing field provisions as a matter of international law, the UK will still remain bound to a level playing field as a matter of domestic law, as current EU law will be incorporated into domestic law at the point of exit under the European Union (Withdrawal) Act 2018. This could be changed by a future government, but given the lack of a working majority, it is unlikely that the current government could.

TRANSITION

Aside from the above, most of the previous draft Withdrawal Agreement remains the same. In particular, the Withdrawal Agreement still includes provision for a transition period until 31 December 2020, although some of this period has been eaten up by the previous extension to the Article 50 period. The parties will also still have the option to extend the transition period until either the end of 2021 or the end of 2022 should they decide - by 1 July 2020 - to do so by mutual agreement.

During this period the UK will for the most part continue to be treated as if it were still a member of the EU. EU rules will still apply in the UK and the UK will continue to pay into the EU budget, though the UK's voting rights will be ended and it will lose its membership of the EU institutions.

Not everything will necessarily stay the same for the UK during the transition period. Third countries might not be willing to treat UK as if it were still an EU member state under their trade or other agreements with the EU or under their local law (for instance, when giving special treatment to "EU" firms for the purposes of local derivatives regulation). However, the UK government has sought to make arrangements with many third countries to preserve the status quo during this period. In addition, the exit of the UK from the EU may have an impact on contracts or other documents (for instance, it may no longer be wholly clear whether references to "EU" or the "EEA" include the UK), though the courts may take a practical view on this in the event of a dispute.

WHAT HAS CHANGED IN THE POLITICAL DECLARATION?

Again, not much. Ultimately, the changes have been made to a document that is non-binding. The most significant changes to the Political Declaration can be found in paragraph 77, where the parties agree that the future relationship should maintain a level playing field for open and fair competition. Under Theresa May's deal, those level playing field commitments were contained in the legally-binding Withdrawal Agreement. In addition, the Political Declaration now stresses that the precise nature of these commitments should be

commensurate with the scope and depth of the future relationship and the economic connectedness of the UK and the EU.

Other changes include more specific references to the UK-EU free trade agreement (FTA) to be negotiated in the next phase, replacing references to a "free trade area" from the previous draft. References to possible alignment with EU regulations to facilitate trade have also been removed. The parties have made it clear that the nature of the economic partnership, including issues such as the trading of goods, tariffs and restrictions are to be determined in the next phase when negotiating the FTA.

It is worth noting that the future UK-EU relationship could now go in one of a number of different directions as the negotiations would not now be taking place against the backdrop of the former 'backstop' holding the UK in a customs union and regulatory alignment with the EU. The current UK government would presumably try to negotiate something more like the EU's free trade agreement with Canada. A future UK government could try to negotiate a much more comprehensive deal (even a customs union), or indeed a future government could abandon the idea of an FTA altogether.

Most other provisions in the Political Declaration, including provisions such as those on trade in services and investment, market access, public procurement, movement of people and energy, have remained untouched since the last draft, despite previous suggestions by Mr Johnson that the government would not sign up to EU social, environmental and workers' legislation in the future. Provisions on financial services (and data) are unchanged – still envisaging that parties will endeavour to conclude equivalence (and adequacy) assessments of the other side by June 2020 – but with no binding commitments.

NEXT STEPS

The European Council endorsed the Withdrawal Agreement and Political Declaration on Thursday 17 October. The Council of the European Union will have to authorise the signature of the Withdrawal Agreement by qualified majority, subject to conclusion of the Withdrawal Agreement. The European Parliament will also need to approve the deal by a simple majority, but it is now likely that the European Parliament will not consider giving its consent until the UK Parliament has passed the necessary legislation.

The UK Government failed to secure the passing of a resolution of the House of Commons on Saturday, 19 October approving the Withdrawal Agreement Under the European Union (Withdrawal) (No. 2) Act 2019 (known as the 'Benn Act'), this meant it had to send a letter to the European Council requesting an extension of the Article 50 period to 31 January 2020. The Speaker of the House of Commons rejected the Government's attempt to reintroduce a similar motion on Monday 21 October that might have allowed the Government to retract its letter.

The UK Government has now introduced the European Union (Withdrawal Agreement) Bill (WAB) into the UK Parliament. If adopted, the WAB will enable the Government to ratify the Withdrawal Agreement without any further vote of the UK Parliament, as it overrides provisions in the European Union (Withdrawal) Act 2018 and the Constitutional Reform and Governance Act 2010 that would have imposed additional procedural requirements. More importantly, the WAB will give effect to the Withdrawal Agreement in UK domestic law and set the framework for negotiating the long-term relationship envisaged by the Political Declaration.

The UK Government successfully obtained the approval of the House of Commons to the second reading of the WAB. But it failed in its attempt to obtain the approval of the House of Commons for an accelerated timetable for the passage of the WAB that could have seen the WAB enacted on Thursday, 24

October. As a result, the Government has paused further progress on the WAB pending discussions with other members of the European Council.

WILL THERE BE AN EXTENSION?

The European Council is now considering whether to agree to the UK's request to extend the Article 50 period. If the European Council decides to extend the period to 31 January 2020, the Benn Act requires the UK Government to agree to that. If the European Council decides on a shorter – or even longer - period of extension, the Benn Act also requires the UK Government to agree to that, unless Parliament objects to that extension within a short period after the decision.

But if there is a long extension, the UK Government may opt to seek an early general election first rather than immediately pressing forward with the passage of the WAB. There is a risk for the Government that if it first seeks to secure the passage of the WAB, Parliament might make amendments that require a second referendum or otherwise obstruct the Government's intentions. A general election might give the Government a majority that would enable it to pass the WAB and to implement the deal agreed with the EU - but of course it might not or it might lead to the formation of a Government with a different approach. In any event, if he wants an early general election, the Prime Minister needs to overcome the mechanics of the Fixed Term Parliaments Act via the Parliamentary process prescribed by that Act.

CONCLUSION

The Prime Minister's efforts will now be focused on the discussions with the European Council and the decision whether to seek a general election. If he decides to go forward with the WAB, he will need to keep together the coalition of MPs from across the House who voted in favour of the WAB on its second reading so that they support the WAB throughout all the stages of the legislative process. If the deal comes into effect, the Government, whether led by the current Prime Minister or otherwise, will enter the next phase of negotiations, and may decide to make use of provisions to extend the transition period until 2021 or 2022. One thing that is for certain, a deal, no deal or an extension on the 31 October will not mean that Brexit is done.

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